No. 79971-7

SUPREME COURT OF THE STATE OF WASHINGTON

MELANIE MORIN,

Appellant,

v.

CLARENCE HARRELL and HAZEL HARRELL, husband and wife, and their marital community,

Respondents.

ANSWER TO AMICUS CURIAE BRIEFS OF STATE OF WASHINGTON AND SERVICE EMPLOYEES INTERNATIONAL UNION 775

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I. SUMMARY OF ARGUMENT

Amici State of Washington and SEIU 775 both rely heavily on the following argument: The article II, section 19 constitutional challenge involves merely a procedural defect, which (1) has been cured by subsequent legislative amendments to RCW 49.46.010; (2) alternatively, the procedurally-based constitutional challenge is barred by the doctrine of laches. The argument is without merit. The fundamental flaw with Amici's argument is that the constitutional challenge is clearly substantive in nature. Moreover, the subsequent amendments to RCW 49.46.010 left unchanged the language of subsection (5)(b); thus, the underlying constitutional defect was never cured. Furthermore, laches is an equitable defense founded upon considerations of public policy. It is not the province of the courts to declare laws passed in violation of the constitution valid based upon considerations of public policy. If a law is unconstitutional, it is the province and duty of the courts to say so.

II. ARGUMENT

A. The Amici Arguments Fail Because the Constitutional Challenge is Substantive, Not Merely Procedural.

"In approving an initiative measure, the people exercise the same power of sovereignty as the Legislature does when enacting a statute." *Amalgumated Transit v. State*, 142 Wn.2d 183, 204, 11 P.3d 762 (2000). In determining whether Initiative 518 violated the single subject requirement of

article II, section 19, the analysis begins with the title of the measure. *Id.* at 207. Regarding the subject-in-title requirement of article II, section 19, the inquiry is whether the subject of the measure is expressed in its title. *Id.* at 217. Violations of the single subject and subject-in-title requirements are not simply procedural defects in the mode of the initiative's enactment. Although the process by which the initiative came into being might be procedural, the constitutional inquiry under article II, section 19, as applied to the initiative itself, certainly is not.

1. Article II, Section 19 Imposes a Substantive Constitutional Mandate.

Amicus SEIU 775 raises the oversimplified, and essentially conclusory argument that "the ballot title and single subject claims at issue here are prototypical *procedural* defects." Brief of Amicus SEIU 775 at p. 12, n. 2 (italics original). The argument is misplaced. "Article II, section 19 serves to protect the serious constitutional interests." *Patrice v. Murphy*, 136 Wn.2d 845, 851, 966 P.2d 1271 (1998). As stated in *State ex rel. Arnold v. Mitchell*, 55 Wn. 513, 104 P. 791 (1909):

> ***Perhaps the most salutary provision in our state constitution is section 2, art. 19***: 'No bill shall embrace more than one subject and that shall be expressed in the title.' In it the people have found their most potent weapon against vicious legislation. It is a declaration that truth must go before, shedding its light upon every legislative act. It makes the title speak the object of the law. ***A wholesome statute, if declaratory of a***

> ***subject not within the title, must fall before it***, for it is general in its application. While it is intended as a guard against the bad in legislation, it is also intended as a herald of the true intent and purpose of the law. ***It is not within the power of the courts to declare a law which is passed in contravention of this mandate wholesome because it is so***. If this power were exercised, it would result in a direct violation of the constitutional mandate and a usurpation of the function of the legislature on the part of the courts. Laws would be sustained or defeated by considerations of present policy rather than by reference to the constitution. (Emphasis added).

Id. at 516-17; accord, *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 24-25, 200 P.2d 467 (1948).

The above-quoted language makes clear that the single subject and subject-in-title requirements of article II, section 19 are substantive constitutional mandates, not simply technical procedural requirements that can be subsequently ignored if they are violated.

In *Pierce County v. State*, 150 Wn.2d 422, 78 P.3d 640 (2003), this Court again acknowledged that the single subject and subject-in-title requirements are substantive constitutional mandates. The Court stated, "that Washington law has consistently viewed the term `subject' in article II, section 19 as referring to laws, measures with legal effect." *Id.* at 434. Because the term "subject" refers to "laws, measures with legal effect", the constitutional mandate of article II, section 19 is most definitely substantive, since a law, once enacted, undeniably affects legal rights.

To hold that a violation of article II, section 19 is simply a procedural defect, as Amici want this Court to do, would impermissibly obliterate the fundamental distinction between legal rights and remedies, the former being substantive and the latter procedural. *See*, e.g., this Court's discussion in *Hammack v. Monroe St. Lbr. Co.,* 54 Wn.2d 224, 231-32, 339 P.2d 684 (1959); *Black's Law Dictionary(5th Ed.)* distinguishing "procedure" and "procedural law" from "substantive" and " substantive law".[1]

This Court's opinion in *Petroleum Lease Properties Co. v. Huse*, 195 Wn. 254, 80 P.2d 774 (1938) also acknowledged that article II, section 19 is a substantive constitutional mandate. In holding that a 1937 amendment to the security act violated section 19 of article II, the Court stated:

> While we believe that no improper motive prompted the method followed in the enactment of the legislation here challenged, in that the object sought to be accomplished was within legislative competence, ***nevertheless the constitutional principle involved is too important to be ignored.*** The approval by the court of the method of amending laws followed in this instance would establish a precedent tending to weaken the guards erected by the constitution against improper or improvident legislation.

Id. at 261 (emphasis added).

Thus, this Court has long made clear, in no uncertain terms, that com-

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[1] *Black's* defines the distinction between "procedural law" and "substantive law" by noting that the former "prescribes [the] method of enforcing rights or obtaining redress for their invasion", whereas the latter is "[t]hat which creates duties, rights and obligations". *Black's* defines the term "substantive" as "[a]n essential part or constituent or relating to

pliance with article II, section 19 is not simply a procedural formality; rather, such compliance goes to the heart of safeguarding substantive constitutional principles and limitations on the enactment of laws, whether by an initiative of the people or by the legislature.

The California Supreme Court decision in *Costa v. Superior Court*, 37 Cal.4th 986, 128 P.3d 675, 39 Cal. Rptr.3d 470 (2006) presents an excellent analysis of the distinction between procedural and substantive challenges to an initiative enacted by the people. The Court noted that a challenge to the process by which a proposed initiative is ultimately presented in the ballot to the people is a procedural challenge; however, a challenge that the initiative itself violates the single subject rule is a substantive constitutional challenge. "The legal challenge in the present case does not relate to the substantive validity of the initiative measure but rather involves a procedural claim pertaining to the pre-election petition-circulation process." *Id.* at 10065. "[W]hen a challenge rests upon the alleged unconstitutionality of the substance of the proposed initiative", and not simply the process by which the initiative measure is created, the constitutional challenge may be heard either before or after the initiative takes effect. *Id.*

The Supreme Court of Massachusetts also views laws passed by ini-

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what is essential."

tiatives as involving substantive constitutional requirements, not simply procedural formalities. In rejecting a laches defense to a constitutional challenge to a law enacted by an initiative, the Court in *Sears v. Treasurer & Receiver General*, 327 Mass. 310, 98 N.E.2d 621 (1951) stated, at pages 320-22:

> Since the people have themselves adopted the Constitution with its amendments for their government, they are bound by the provisions and conditions which they themselves have placed in it, and ***when they seek to enact laws by direct popular vote, they must do so in strict compliance with those provisions and conditions***. [Citation omitted.] ***Failure to comply will mean that no valid law has been acted, no matter how great the popular majority may have been in its favor.*** Only by preserving this fundamental principle can constitutional government be preserved and orderly progress assured. The question whether or not the requirements of the Constitution have been observed and a valid law has been enacted is a justiciable question to be determined in the last analysis by the judicial department of the government whenever the question arises in a proper proceeding in court. ***And since judges are bound by the Constitution and must see that its provisions and conditions are at all times faithfully observed, they must determine that question with sole reference to the facts of the case and the language of the Constitution and without the slightest regard to their own personal views as to the desireability or otherwise of the law involved.***
>
> It is proper to observe at this point that ***we cannot agree with the argument of the respondents that because new c. 118A has actually been voted upon and certified by the Secretary of the Commonwealth it is conclusively presumed to be valid whether or not the requirements of the Constitution have been followed.*** This is a misapplication of the principle that the enrollment of a statute is conclusively presumed to embody the action taken by the Legislature upon it...It would be astonishing and intolerable if the safeguards so carefully inserted in art. 48 could be disregarded without consequences

> by individual State officers and so in effect turn into mere admonitions and recommendations. The Constitution is not ordinarily treated in that manner. (Emphasis added.)[2]

Thus, the Massachusetts Supreme Court made clear that the constitutional safeguards governing the initiative process are so fundamental that they must be upheld to strike down an unconstitutionally enacted law, regardless of how popular that law might otherwise be, and regardless of whether it comports with the personal views of the judges who must consider the validity of the law. Where the constitutional requirements have not been followed in enacting a law, it is unconstitutional, and remains so regardless of the passage of time. "***An unconstitutional law cannot be made valid by the laches of anyone or by any lapse of time.***" *Id.* at 326-27 (emphasis added).

2. The Subsequent Amendments to RCW 49.46.010 Did Not Retroactively Cure the Constitutional Defect Underlying RCW 49.46.010(5)(b).

RCW 49.46.010(5)(b) has never been amended; its language has remained unchanged since it was enacted pursuant to Initiative 518. Accordingly, the underlying constitutional defect has not been cured. Moreover, the subsequent amendments to other subsections of RCW 49.46.010 were prospective in their application, and not remedial or curative.

"Regardless of how the statute is characterized, it is presumed to run

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[2]Art. 48 was adopted by the people of the State of Massachusetts in 1918, providing that laws could be enacted by direct popular vote. *Id.* at 320.

prospectively, as are all statutes." *1000 Virginia Ltd. P'ship v. Vertecs*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006). "However, a statute or an amendment to a statute may be retroactively applied if the legislature so intended, if it is clearly curative, or if it is remedial, provided that retroactive application does not "'run a foul of any constitutional prohibition.'" *Id.* (quoting, *inter alia, McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 324-25, 12 P.3d 144 (2000)). Under these principles, the subsequent amendments to RCW 49.46.010, none of which applied to subsection (b)(5), can in no way be said to apply retroactively to cure or remedy the underlying constitutional defect.

3. No Washington Case Holds that a Violation of the Article II, Section 19 Can be Cured by Subsequent Amendments That Do Not Address the Underlying Constitutional Violation.

Both Amici cite *Pierce County v. State*, 159 Wn.2d 16, 148 P.3d 1002 (2006) to stand for the proposition that, "Washington courts have consistently recognized that reenactment of a statute, the initial adoption of which may have been subject to challenge on procedural grounds, cures any defect." Brief of SEIU 775 at p. 8; *see, also*, State of Washington's brief at p. 13. Amici's argument is without merit.

In *Pierce County*, this Court stated the issue before it, and its holding, as follows:

> In this case we are asked to decide whether I-776 conflicts with Washington Constitution article I, section 23, which guarantees that "'[n]o...law imparing the obligations of contracts shall ever be passed.' The purpose of the contract clause is to lend certainty to the reliability of contractual pledges. Such certainty is essential to the ability of the state and local governments to obtain credit through the capital markets. We find that section 6 [of I-776] reduced the Sound Transit bond holder's security. Accordingly, we hold that section 6 impermissibly impairs the contractual obligations between Sound Transit and the bond holders.

Id. at 51.

The intervenors in *Pierce County* argued that "the voters were not entitled to rely on RCW 81.112.030(a), part of the enabling statute effective in 1996, because...the prior amendments to the statute were improper." *Id.* at 39-40. In rejecting this argument, this Court stated:

> Intervenors failed to recognize that the legislature's 1994 amendment to RCW 81.112.030 superseded the 1993 act. "'***[W]here a governing body takes an otherwise proper action later invalidated for procedural purposes only, that body may retrace its steps and remedy the defects by reenactment with proper formalities.***' *Henry v. Town of Oakville*, 30 Wn. App. 240, 246-47, 633 P.2d 892 (1981). In *Henry* itself, the Court of Appeals allowed a town to reenact and ratify an ordinance, originally passed without proper notice under the open meetings laws, authorizing a bond issue. *See, also, Eugster v. City of Spokene*, 110 Wn. App. 212, 39 P.3d 380 (2002) (holding that a procedural challenge to the validity of a city ordinance was moot since the ordinance had subsequently been properly enacted)."

Id. at 40 (emphasis added).

In its conclusion on this issue, the Court stated:

> We conclude that even if the 1993 amendments to RCW 81.112.030(a) were not properly included in the 1993 transportation appropriations bill, ***the 1994 legislature reenacted the statute in a bill***, which the intervenors do not challenge as violating Washington constitution article II, section 19. ***And the 1994 amendments, like the 1993 amendments, removed any reference to a requirement that the public vote on ratification of the formation of a regional transit authority. The 1994 amendments, therefore, ratified and cured any defect in the 1993 enactment.***

Id. at 41 (emphasis added).

At best, the Court's conclusion stands for the proposition that when legislation is enacted in violation of article II, section 19, because it was improperly attached to an appropriations bill, the legislature may remedy the defect by reenacting the legislation without the constitutional infirmity. Here, RCW 49.46.010(b)(5) is invalid because Initiative 518 violated the substantive constitutional mandate of article II, section 19. Moreover, the constitutional violation has not been cured by any reenacting legislation or amendment.

In *dicta*, the Court in *Pierce County* stated:

> Although our courts have not had occasion to apply this principle to claims arising out of article II, section 19 of the constitution, other jurisdictions have applied it in this constitutional context. In *Mispagel v. Missouri Highway & Transportation Commission*, 785 S.W.2d 279 (Mo. 1990), a Missouri statute was challenged on the ground that the bill dealt with more than one subject. The Missouri Supreme Court rejected this challenge, ***holding that since the reenacting bill was not subject to the alleged infirmity asserted in the 1985 bill,***

> '***[a]ny defect in the enactment, therefore, has been cured.***' *Id.* at 281. In *Nichols v. Tullahoma Open Door, Inc.*, 640 S.W.2d 13 (Tenn. App. 1982), the Tennessee Court of Appeals ruled moot a challenge to a Tennessee statute on the basis that ***the subsequent reenactment and recodification of the statute cured any constitutional defect.*** In *Honchell v. State*, 257 So.2d 889 (Fla. 1971), the Florida Supreme Court rejected the claim that a statute defining criminal activity was invalid because its original enactment violated "double subject" provisions of the Florida constitution ***because the statute in question had been reenacted.*** And in another case, the Florida Supreme Court held that any defect in the title of the original act creating a turnpike authority ***had been cured by the adoption of the revised statutes***, including the act. *Spangler v. Fla. State Turnpike Auth.*, 106 So.2d 421 (Fla. 1958).

Id. at 40-41 (emphasis added).

In the case at bar, no subsequent reenactment of Washington's Minimum Wage Act has occurred to cure the constitutional defect underlying RCW 49.46.010(5)(b). Moreover, the Court in *Pierce County* did not reach a conclusion on the article II, section 19 question; nor was its passing discussion of the subject necessary to the Court's holding. Accordingly, the above-quoted passage has no binding, precedential effect. *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 442 n. 11, 120 P.3d 46 (2005) (quoting *State v. Potter*, 68 Wn.App. 134, 149 n. 7, 842 P.2d 481 (1992): "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed."

4. This Court Has Previously Acknowledged That a Subsequent Legislative Enactment Does Not Render Moot the Issue of Whether an Initiative Has Violated the Single Subject and Subject-in-Title Requirements of Article II, Section 19.

In *Amalgumated Transit*, this Court held that Initiative 695 violated both constitutional prohibitions of article II, section 19. *Amalgumated Transit*, 142 Wn.2d at 256. The ballot title of Initiative 695 stated: "Shall voter approval be required for any tax increase, license tab fee be $30 per year per motor vehicle, and existing vehicle taxes be repealed." I-695 was passed by the voters in November 1999. *Id.* at 193. In March of 2000, King County Superior Court Judge Alsdorf found the initiative unconstitutional because, *inter alia*, it violated article II, section 19. *Id.* at 198-99. "After the trial court's decision, on March 31, 2000, the Legislature enacted Senate Bill 6865 (Laws of 2000 1st Spec. Sess., ch. 1) repealing the MVET and setting vehicle license tab fees at $30." *Id.* at 199. This Court found that the subsequent legislative act did render moot the article II, section 19 constitutional challenges to I-695. *Id.* at 200-201. "The Legislature's action providing some relief to local government cannot validate an unconstitutional measure." *Id.* at 201.

Thus, this Court ruled that a challenge to an unconstitutional initiative is not rendered moot by a partially superseding enactment by the Legislature if the initiative has a continuing impact. *Id.* Here, RCW 49.46.010(b)(5) has not been changed by subsequent legislative action; thus the impact of Initia-

tive 518 continues.

Recently, in *City of Fircrest v. Jensen*, 158 Wn.2d 384, 143 P.3d 776 (2006), this Court's majority opinion reaffirmed the article II, section 19 analysis set forth in *St. Paul & Tacoma Lumber Co. v. State*, 40 Wn.2d 347, 243 P.2d 474 (1952). Thus, "When an act purports to amend a prior act, the relevant title to be examined under article II, section 19 is the title of the original act." *Id.* at 390. In upholding the *St. Paul* rule, this Court stated:

> Any original act passed by the legislature is subject to traditional article II, section 19 challenges, ensuring compliance with our constitution and adherence to the goals stated above. When amending an original act, it is unnecessary to examine the amendatory title for strict compliance with article II, section 19 because the underlying act has already passed such scrutiny.

Id. at 391. It therefore follows that, if the original act fails to pass constitutional muster under traditional article II, section 19 challenges, subsequent amendments that simply incorporate the unconstitutional act, without change, are likewise unconstitutional and do not operate to cure the original constitutional defect.

There is no sound reason for treating initiatives passed by the people any differently. "In approving an initiative measure, the people exercise the same power of sovereignty as the Legislature does when enacting a statute." *Amalgamated Transit*, 142 Wn.2d at 204. Accordingly, the subsequent

amendments to RCW 49.46.010, none of which altered subsection (5)(b), should have no bearing on the article II, section 19 challenge to Initiative 518.

B. Because it is Not the Province of the Courts to Declare Laws Passed in Violation of the Constitution Valid Based Upon Considerations of Public Policy, the Equitable Doctrine of Laches, Which is Founded Upon Such Considerations, is Inapposite.

1. Laches is a Defense that Rests Upon Policy Considerations.

Laches is an equitable defense. *LaVergne v. Boysen*, 82 Wn.2d 718, 720, 513 P.2d 457 (1973). Its application depends upon the equities of a particular case and considerations of public policy. *Id.* at 721. In *LaVergne*, laches applied because of the substantial public interest in the finality of elections. *Id.* In *State ex rel. Hartzell v. Seattle*, 199 Wn. 455, 461, 92 P.2d 199 (1939), laches did not apply, "since it is against the public policy of this state for employees of a municipal corporation to waive any part of their salaries as lawfully fixed". In *Citizens v. Kitsap County*, 52 Wn. App. 236, 240, 758 P.2d 1009 (1988), laches applied to bar a procedural challenge to a zoning decision because of "public interest in the finality of zoning decisions".

"***The principal element in applying laches is*** not so much the period of delay in bringing the action but ***the fact of resulting prejudice and damage to others***." *Pierce v. King County*, 62 Wn.2d 324, 332, 382 P.2d 628 (1963) (emphasis added). The Court of Appeal's decision in *Pierce* involved a fact-specific balancing of the equities, in which considerations of public

policy were fundamental to the analysis. *Id.* at 332-40.

2. Courts Cannot Resort to Policy Considerations to Save an Unconstitutional Law Without Usurping the Function of the Legislature.

This Court has long held that *it is not* "the province of the courts to declare laws passed in violation of the Constitution valid based upon considerations of public policy." *Amalgumated Transit*, 142 Wn.2d at 206, citing *Wash. Toll Bridge Auth;* 32 Wn.2d at 24-25. As this Court made clear in *State ex rel. Arnold v. Mitchell*, to do so would be a direct usurpation of the function of the legislature:

> It is not within the power of the courts to declare a law which is passed in contravention of this [section II, article 19] mandate wholesome because it is so. If this power were exercised, it would result in a direct violation of the constitutional mandate and a usurpation of the function of the legislature on the part of the courts. Laws would be sustained or defeated by considerations of present policy rather than by reference to the constitution.

55 Wn. at 516 (quoted in *Wash. Toll Bridge Auth.*, 32 Wn.2d at 24-25).

Amici impermissibly appeal to considerations of public policy in raising the bar of laches, as their authorities make clear. *See Cole v. State*, 308 Mont. 265, 482 P.3d 760 (2002) (plaintiffs' challenge to *the process* by which an initiative was enacted was rejected for policy reasons because of the impact upon those who had relied upon its presumptive validity); *Stilp v. Hafer*, 553 Pa. 128, 718 A.2d 290 (1998) (a challenge to procedural deficien-

cies in a statute's enactment barred because others had changed their position and expended time and money in reliance on its validity); *Ninth Street Improvement Co. v. Ocean City*, 90 N.J.L. 106, 100 A. 568 (1917) (challenge to a building code ordinance barred because it was reasonable to assume that the citizens affected by the ordinance had conformed to it); *Benequit v. Borough of Monmouth Beach et al.*, 125 NJL 65, 13 A.2d 847 (1940) (procedural challenge to zoning ordinance barred because presumably citizens had conformed to its provisions); and *State v. Mabry*, 460 N.W.2d 472 (Iowa 1990) (constitutional challenge to legislative act rejected, not on basis of laches, but because Iowa Code section 14.15 provides a specific window of time for challenging new legislation, and that statutory period had run).[3]

Amici cite two Washington cases, *Citizens for Responsible Gov't v. Kitsap County*, 52 Wn. App. 236, 758 P.2d 1009 (1998) and *Buell v. City of Bremerton*, 80 Wn.2d 518, 496 P.2d 1358 (1972), for the proposition that laches may bar a challenge to the procedure by which a zoning ordinance is enacted, as opposed to the nature of the ordinance itself. Those cases do not involve an article II, section 19 challenge to an initiative or a bill; therefore, they are inapposite.

Furthermore, the instant challenge is not aimed at the procedure by

[3] No similar statute appears to exist in Washington state.

which the ballot title and language in Initiative 518 were derived; rather, the challenge is whether the language itself comports with the substantive constitutional mandate of article II, section 19. To hold that the challenge is barred by laches would run afoul of well-established precedent in this state; it would also constitute a judicial usurpation of legislative powers and an abdication of this Court's duty to declare unconstitutionally enacted laws invalid. *Wash. Toll Bridge Auth.*, 32 Wn.2d at 24-25; *Arnold*, 55 Wn. 513 at 516; *Amalgumated Transit*, 142 Wn.2d at 256.

3. Laches Does Not Apply Under the Facts of This Case, Because Respondents Were Not Dilatory in Raising the Constitutional Challenge to Initiative 518.

"Laches `is an equitable principle that in a general sense relates to neglect for an unreasonable length of time, under circumstances permitting diligence, to do what in law should have been done.'" *Retail Clerks v. Shopland Supermarket*, 96 Wn.2d 939, 948-49, 640 P.2d 1051 (1982) (quoting *Arnold v. Melani*, 75 Wn.2d 143, 147, 437 P.2d 908 (1968)). The record below establishes that Respondents, Clarence and Hazel Harrell, were not dilatory in raising their constitutional challenge to Initiative 518. For laches purposes, the issue is whether they should have known, either from the ballot title of the initiative or from the statute enacting it, that caregivers would be entitled to overtime compensation under the Minimum Wage Act.

The only class of workers identified in the ballot title of Initiative 518 is "agricultural workers". There is obviously no nexus between "agricultural workers" and "caregivers." RCW 49.46.010(5)(b) exempts from overtime compensation "any individual employed in casual labor in or about a private home". On its face, it is not readily apparent that the phrase "employed in casual labor" includes, rather than excludes, "caregivers". In any event, it can hardly be said that the statute is a model of definitional clarity; rather, the definition of "employed in casual labor" is certainly subject to interpretation.

Furthermore, Clarence Harrell had no reason to even consider the statute until 1996, when his wife suffered a disabling stroke, and thereafter required caregivers to provide at-home assistance. CP at 6-7, 43-44. During her employment as a caregiver for Mrs. Harrell, Appellant asked Mr. Harrell whether she was entitled to overtime compensation. Relying on the advice of his accountants, Mr. Harrell informed Appellant that she was not. CP at 8, 45. It was not until Appellant filed the instant lawsuit, following her termination in January of 2005, that Mr. Harrell had reason to hire a lawyer, who then raised a constitutional challenge to Initiative 518. Under these unique facts, the equitable doctrine of laches simply should not apply to bar Mr. Harrell's constitutional challenge.

III. CONCLUSION

"Perhaps the most salutary provision in our state constitution is section II, art. 19." *Arnold*, 55 Wn. at 516. The constitutional mandate embodied therein constitutes an essential check on legislative power that goes to the heart of our constitution. "We have declared that when laws are enacted in violation of this constitutional mandate, the courts will not hesitate to declare them void." *Wash. Toll Bridge Auth.*, 32 Wn.2d at 24.

"It is not within the power of the courts to declare a law which is passed in contravention of this mandate wholesome because it is so." *Arnold*, 55 Wn. at 516. If a law is unconstitutional, it is the duty of the court to say so, without regard to considerations of public policy. *Id.* To treat a violation of the constitutional mandate as being merely a procedural defect that can be waived or barred by the passage of time, or because the judges reviewing the law personally believe it to be good, would be to set a dangerous and unwarranted precedent. Indeed, it would promote and encourage the very evils article II, section 19 was designed to prevent. Proponents of bills or initiatives could bury unrelated subjects in the body of the proposed law, without disclosing them in the title; then, after the law is enacted, either (1) push for a quick amendment to "cure" the defect, or (2) raise the doctrine of laches if anyone later challenges the unconstitutional act.

Moreover, if laches were allowed as a defense to unconstitutional laws, an unwieldly situation would exist that would inevitably be resolved by impermissible considerations of public policy and the balancing of competing interests. Once a law goes into effect, people will immediately rely on its presumptive constitutionality. At what point can it be said that a person challenging the law has waited too long to do so? How many people would have to change positions before laches would apply? Ultimately, these questions would be answered ad hoc, and inevitably the decision would turn on the equities and policy considerations underlying each case.

Accordingly, it is respectfully submitted that this Court should find Initiative 518 unconstitutional, and sever RCW 49.460.010(b)(5) from the Minimum Wage Act, leaving the rest intact. The severability clause of RCW 49.46.900 should allow this; *see, also, Amalgamated Transit*, 142 Wn.2d at 227-28.

DATED this 14TH day of May, 2007.

Respectfully submitted,

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